United States Court of Appeals

for the Second Circuit

APPENDIX

74-1251

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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REA EXPRESS, INC. Petitioner, v. CIVIL AERONAUTICS BOARD Respondent, and AIR EXPRESS INTERNATIONAL CORPORATION Intervenor	Docket No. 74-1251

JOINT APPENDIX

Peter G. Wolfe
REA Express, Inc.
219 East 42nd Street
New York, New York 10017

Glen M. Bendixsen
Associate General Counsel
Civil Aeronautics Board
Washington, D. C. 20428

Henry J. Silberberg
Stroock, Stroock & Lavan
61 Broadway
New York, New York 10006

May 13, 1974

PAGINATION AS IN ORIGINAL COPY

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COMPLAINT, REA EXPRESS, INC. v. WINGS AND WHEELS EXPRESS, INC.

REA EXPRESS, INC.
v.
WINGS AND WHEELS EXPRESS, INC.

COMPLAINT

1. REA Express, Inc. (REA) is a Delaware Corporation doing business throughout the United States with its principal place of business at 219 East 42 Street, New York, New York. It is an indirect air carrier which renders Air Express service under C.A.B. Agreement 17935 approved most recently by the Civil Aeronautics Board in Order 70-11-20 dated July 5, 1972 and an exemption granted by the Board, most recently in Order E-22273.

2. Wings and Wheels Express, Inc. (Wings and Wheels) is a domestic corporation with its principal place of business at Cargo Building No. 89, John F. Kennedy International Airport, Jamaica, New York 11430. It is a domestic and international air freight forwarder authorized under Parts 296 and 297 of the Board's Regulations.

3. REA originated the first Air Express shipment in 1910 and the first Air Express regular service in September, 1927, seventeen years before publication of the first air freight tariff. Since its origination, Air Express has been defined as the air service of REA provided under CAB Agreement 17935. REA has spent substantial sums in advertising the term "Air Express." Air Express is the only service which (1) serves all airport cities and almost all other communities in the nation as a single carrier, with integrated operation, and does so under a single through waybill with single carrier responsibility (2) routinely provides priority handling on the ground (3) carries virtually all commodities tendered to it; and (4) receives priority on the aircraft. In the Air Freight Forwarder Case, 9 C.A.B. 473 (1948), the Board found (at 488) that Air Express service is an "expedited dependable service by air which has come to be relied on by a large proportion of the public.... [and is] a separate and distinct expedited service differing in many essential details from air freight service." REA's use of the term Air Express had thereby acquired a secondary meaning, i.e. REA's distinctive air services prior to the time that any air freight forwarder was authorized by the Civil Aeronautics Board. As recently as May 25, 1972, Examiner James L. Keith found that

"air express" is clearly distinguishable from the other [freight] services and has a special utility that the operations of the air freight forwarders and direct air carriers presently do not supply. Express Service Investigation, Docket 22388. REA has been granted the Service Mark "Air Express" in U. S. Reg. No. 716,631 and 942,482 by the Patent Office.

4. Air Freight forwarding services were first authorized by the Board in the Air Freight Forwarder Case in 1948. Subsequently, Wings and Wheels and Air Express International Corp. (AEIC) received authorizations as air freight forwarders from the Civil Aeronautics Board.

5. In 1967, Wings and Wheels acquired AEIC and in 1970 the carriers merged. At that time, Wings & Wheels was issued international air freight forwarding authority in the name of Wings and Wheels Express, Inc. d/b/a Air Express International.

6. Wings and Wheels' International services carried out in the name of Air Express International, are competitive with REA's operations in that they involve hauls from interior points to domestic gateways before shipment to foreign points.

7. The use of the name "Air Express International" by Wings and Wheels is inherently likely to confuse Air

Express customers of REA and make them believe that Wings and Wheels' services are really those of REA.

8. REA has not previously filed complaints against users of the term "Air Express" because until August, 1969, REA was owned by the railroads, who prevented it from doing so.

9. The use of the name "Air Express International" constitutes an unfair method of competition within the meaning of Section 411 of the Federal Aviation Act of 1958, as amended. See North American Air., Section 411 Proceeding, 18 C.A.B. 96 (1953); American Airlines, Inc. v. North American Airlines, Inc., 351 U. S. 79 (1956).

WHEREFORE, the Board should order Wings and Wheels Express, Inc. to cease and desist from the use of the name "Air Express International" and grant whatever other relief may be just and equitable.

Respectfully submitted,

Peter G. Wolfe

Peter G. Wolfe
Attorney

COMPLAINT, REA EXPRESS, INC. v. DOMESTIC AIR EXPRESS, INC.

REA EXPRESS, INC.
v.
DOMESTIC AIR EXPRESS, INC.

COMPLAINT

1. REA Express, Inc. (REA) is a Delaware Corporation doing business throughout the United States, with its principal place of business at 219 East 42 Street, New York, New York. It is an indirect air carrier which renders Air Express service under C.A.B. Agreement 17935 approved most recently by the Civil Aeronautics Board in Order 72-7-8 dated July 5, 1972, and an exemption granted by the Board, most recently in Order E-22273.

2. Domestic Air Express, Inc. (DAX) is a domestic corporation with its principal place of business at 147-17 176 Street Jamaica, New York 11434. It is a domestic air freight forwarder authorized under Part 296 of the Board's Regulations.

3. REA originated the first Air Express shipment in 1910 and the first Air Express regular service in September,

1927, seventeen years before publication of the first air freight tariff. Since its origination, Air Express has been defined as the air service of REA provided under CAB Agreement 17935. REA has spent substantial sums in advertising the term "Air Express." Air Express is the only service which (1) serves all airport cities and almost all other communities in the nation as a single carrier, with integrated operation, and does so under a single through waybill with a single carrier responsibility, (2) routinely provides priority handling on the ground; (3) carries virtually all commodities tendered to it; and (4) receives priority on the aircraft. In the Air Freight Forwarder Case, 9 C.A.B. 473 (1948), the Board found (at 488) that Air Express service is an "expedited dependable service by air which has come to be relied on by a large proportion of the public....[and is] a separate and distinct expedited service differing in many essential details from air freight service." REA's use of the term Air Express had thereby acquired a secondary meaning, i.e. REA's distinctive air services, prior to the time that any air freight forwarder was authorized by the Civil Aeronautics Board. As recently as May 25, 1972, Examiner James L. Keith found that "air express" is clearly distinguishable from the other [freight] services and has a special utility that the operations of the air freight forwarders and direct air carriers presently do not supply.

Express Service Investigation, Docket 22388. REA has been granted the Service Mark "Air Express" in U. S. Reg. No. 716,631 and 942,482 by the Patent Office.

4. Air Freight forwarding services were first authorized by the Board in the Air Freight Forwarder Case in 1948. Domestic Air Express, Inc. received authorization as an air freight forwarder from the Civil Aeronautics Board.

5. Domestic Air Express, Inc.'s operations as a domestic freight forwarder are directly competitive with the domestic Air Express operations of REA.

6. The use of the name Domestic Air Express by DAX is inherently likely to confuse Air Express customers of REA and make them believe that DAX's services are really those of REA.

7. REA has not previously filed complaints against users of the term "Air Express" because until August, 1969, REA was owned by the railroads, who prevented it from doing so.

8. The use of the name "Domestic Air Express" constitutes an unfair method of competition within the meaning of Section 411 of the Federal Aviation Act of 1958, as amended. See North American Air., Section 411 Proceeding, 18 C.A.B. 96 (1953); American Airlines,

Inc. v. North American Airlines, Inc. 351 U. S. 79 (1956).

WHEREFORE, the Board should order Domestic Air Express, Inc. (DAX) to cease and desist from the use of the name "Air Express" and grant whatever other relief may be just and equitable.

Respectfully submitted,

Peter G. Wolfe

Peter G. Wolfe
Attorney

VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

PETER G. WOLFE, being duly sworn, deposes and says,

That he is attorney for REA Express, Inc.; that he has read the above complaint and knows the contents thereof; that the things therein stated are true of his own knowledge except such matters therein stated on information and belief, and as to those matters he believes them to be true.

Peter G. Wolfe
Peter G. Wolfe

Sworn to before me this
4th day of October, 1972

Geraldine M. French

GERALDINE M. FRENCH
Notary Public, State of New York
No. 03-1315960
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1973

ANSWER OF WINGS AND WHEELS EXPRESS, INC.

REA EXPRESS, INC.,	)	
	)	
Complainant,	)	
	)	
v.	)	Dkt. No. 24811
	)	
WINGS and WHEELS EXPRESS, INC.,	)	
	)	
Respondent.	)	

ANSWER

Respondent, Air Express International Corporation, formerly Wings and Wheels Express, Inc., answers the allegations set forth in the complaint as follows:

1. Admitted.

2. Admitted except as to the location of respondent's principal place of business, and its current corporate name.

3. Denied as to sentences 4 and 6; respondent is without sufficient knowledge or information to admit or deny the remaining allegations of paragraph 3.

4. Admitted.

5. Admitted.

6. Denied.

7. Denied.

8. Admitted insofar as it states that no previous complaint has been filed against users of the term "Air Express"; respondent is without sufficient knowledge or information to admit or deny the remaining allegations of paragraph 8.

9. Denied.

FIRST DEFENSE

The issue raised by the complaint has already been considered and resolved in favor of respondent by the Civil Aeronautics Board (CAB). In proceedings in which all parties to this case participated, the Board found that respondent's predecessor was qualified to conduct air freight forwarding services using the name Air Express International." Succeeding authorizations have been issued by the CAB permitting air freight forwarding services to be performed under the name Air Express International. Therefore the principles of res judicata and collateral estoppel prohibit reexamination of this issue in this proceeding.

Air freight forwarding services were first authorized by the Board in the Air Freight Forwarder Case. 9 C.A.B. 473 (1948). This investigation resulted from the consolidation of applications for certificates of convenience and necessity to operate as domestic freight and express forwarders filed by Air Express International Corp., respondent's predecessor; Air Express International Agency, Inc., a related company; numerous other freight forwarders and Railway Express Agency, complainant's predecessor. Most of the certificated air carriers also participated. The Board found that it was in the public interest to authorize air freight forwarding services.

Air Express International Corp. and Air Express International Agency, Inc. were found by the Board to be qualified for exemptions to operate as domestic air freight forwarders and authorizations to conduct such services were issued to them in 1948. CAB Order No. E-1968.

A similar proceeding, involving the same parties, was conducted concerning international air freight forwarding services. Air Freight Forwarder Case (International), 11 C.A.B. 182 (1950). As a result international air freight forwarding services were authorized by the Board and Air Express International Corp. was granted an exemption to perform international services.

These opinions were subsequently reexamined and affirmed by the Board in the Air Freight Forwarder Investigation, 21 C.A.B. 536 (1955) and the International Air Freight Forwarder Investigation, 27 C.A.B. 658 (1958) respectively. These decisions extended Air Express International Corp.'s domestic and international air freight forwarding authorizations indefinitely.

Air Express International Corp. continued to provide both domestic and international air freight forwarding services until its merger with Wings and Wheels Express, Inc., in 1970. At that time Air Express International became the international operations division of the company. Respondent is currently authorized under CAB Operating Authorization No. 412 issued June 15, 1970, to conduct international air freight forwarding operation under the name Air

Express International. Thus the possibility that the use of the name Air Express International by respondent would cause public confusion has been considered by the CAB, as required by Part 215 of the Board's Economic Regulations, as recently as 1970.

On June 6, 1972, respondent applied to the Board for permission to change its name to Air Express International Corporation and to operate its domestic as well as international air freight forwarding services under that name. Although that application has been deferred pending resolution of the present complaint, the Bureau of Operating Rights has raised no objections to the requested name change. In fact, acting on instructions from the Bureau, respondent amended its Articles of Incorporation to change its name to Air Express International Corporation.

Since respondent's qualification to perform air freight forwarding services under the name Air Express International have been examined and approved by the Board on numerous prior occasions, including proceedings in which complainant participated, this question should not now be relitigated.

SECOND DEFENSE

Since respondent has performed air freight forwarding services under the name Air Express International for almost 40 years, has developed a worlwide organization of subsidiary companies for international operations and has expended considerable effort and money in promoting its business, it would be inequitable to now deprive it of

the use of the name Air Express International.

Air Express International Corp., respondent's predecessor, was founded and began air freight operations in 1935. It and a related company, Air Express International Agency, Inc., were among the companies originally authorized by the Board to perform air freight forwarding services. Air Freight Forwarder Case, 9 C.A.B. 473 (1948); Air Freight Forwarder Case (International), 11 C.A.B. 182 (1950). Since that time respondent has continuously conducted air freight forwarding services under the name Air Express International.

Due solely to respondent's efforts, the name Air Express International currently enjoys an excellent reputation in the air freight forwarding industry. This is demonstrated by the fact that respondent's international operations are second largest among all United States air freight forwarders.

In order to provide efficient and dependable international air freight forwarding services respondent has established a worldwide network of subsidiary companies. These companies, which are separately incorporated in the countries in which they operate all employ the use of the name Air Express International. The following is a partial list of the companies which will be affected by the resolution of this case.

Air Express International Agency (France)
Air Express International G.m.b.H. (Germany)
Air Express International (Belgium) S.A.
Air Express International (S.A.) Pty. Ltd. (South Africa)
Air Express International Agency, Ltd. (Canada)

Air Express International Espana, S.A. (Spain)
Air Express International A/S (Denmark)
Air Express International (H.K.) Ltd. (Hong Kong)
Air Express International Enterprises, Ltd. (Zug.) (Switzerland)
Air Express International Singapore (Pty.) Ltd. (Singapore)

In light of the expense and effort involved in developing this worldwide system it would clearly be inequitable to require respondent to abandon its name at this late date.

Respondent is currently in the process of bringing its domestic operations under the name Air Express International. On June 5, 1972, the company's stockholders approved the change of name from Wings and Wheels Express, Inc. to Air Express International Corporation. All of these steps involved considerable expense to the company. In light of its long history of use of the name Air Express International it would be patently inequitable to require respondent to reorganize and rename its business operations.

THIRD DEFENSE

Since complainant has, for over 35 years, knowingly acquiessed in the use of Air Express International as the name under which respondent conducts its air freight forwarding operations this complaint should be dismissed for laches.

Complainant, and its predecessor Railway Express Agency, have been aware since the Air Freight Forwarder Case in 1948 that respondent conducts freight forwarding operations under the name Air Express International. But, as it states in the complaint "REA has not previously

filed complaints against users of the term 'Air Express' ...." During this interval respondent has actively built its worldwide air freight forwarding business under the name Air Express International. Currently the respondent's international operations are second largest among all United States air freight forwarders. The reputation associated with the name was built only through the efforts of respondent and its predecessor. Complainant attempts to explain its dilatory actions by stating that "until August, 1969, REA was owned by the railroads ...." Clearly, complainant's ownership and internal organization are irrelevant in the instant proceedings, and cannot justify its inaction. In reliance on the validity of the use of the name Air Express International respondent has continued to develop its business and promote the name Air Express International. Deprivation of the good will thus established would be an unwarranted hardship on respondent due largely to complainant's lack of diligence.

Furthermore, relying on its long, unchallenged use of the name, respondent has expended considerable time and effort to change its name and bring its domestic operations under the name Air Express International. Acting under instruction of the Bureau of Operating Rights its corporate name has officially been changed to Air Express International Corporation. In order to obtain stockholder approval for this name change respondent undertook a public proxy solicitation prior to the stockholder meeting held on June 5, 1972. Preliminary

proxy material was filed with the Securities and Exchange Commission and was available to the public. Complainant made no attempt at that time to restrict use of the term Air Express International. It should not be allowed to attempt such a restriction now, after the change has been affected.

FOURTH DEFENSE

Complainant has failed to show any actual confusion resulting from the use of the name Air Express International by respondent. Without evidence of adverse impact on other air carriers it cannot be found that respondent engaged in unfair methods of competition. See e.g., Eastern Airlines Enforcement Proceeding, 30 CAB 862, 864 (1960). Complainant has not alleged any incident wherein a shipper was confused as to the source or type of air cargo service offered by respondent. It should be noted in this context that complainant is not attempting to prohibit the introduction of a new name similar to one which it had prior, exclusive use of but to curtail the use of a long established name continuously used by respondent in its business. But complainant has filed to allege even a single incident of confusion due to respondent's use of the name Air Express International. To the contrary, complainant has denied the existance of public confusion between it and respondent due to their names. In its 1970 application to the Board for permission to change its name complainant declared that "No existing or former air carrier or foreign air carrier has a

name which is similar to or may cause public confusion with REA Express, Inc." Dkt. No. 22676, Approved, Order No. 70-11-126, Nov. 25, 1970.

Respondent's customers are business and commercial firms who are not likely to be confused regarding the type of service they are purchasing. Over 3000 regular customers account for approximately 80% of respondent's business. These are principally manufacturers and distributors of machines and machine parts, cosmetics, drugs, apparel, printed matter, electrical parts and advertising material. Respondent's sales efforts are directed toward business firms rather than the general public. In its advertising and sales respondent has never represented itself as other than an air freight forwarder. Moreover, respondent is usually identified in the industry by its initials and logo, "AEI" which it emphasizes in its advertising material, waybills, truck markings, etc.

FIFTH DEFENSE

Complainant bases much of its case on the distinction between air express and air freight as types of air cargo. As authority for this distinction it cites Examiner Keith's initial decision in the Express Service Investigation, Dkt. No. 22388, May 25, 1972. However, exceptions have been filed to this decision and the continuation of the distinction has yet to be decided by the Board. Specifically the Bureau of Operating Rights had excepted to the examiners finding that the "so-called air express service currently being provided by the airlines and

REA pursuant to an agreement has a utility distinguishable from the other air freight services." (Bureau of Operating Rights, Exceptions filed June 9, 1972. Dkt. No. 22383). Surely the uncertainty of the continuation of the distinction between air express and air freight services makes that distinction an inappropriate basis for depriving respondent of the use of its long established name in providing air freight forwarding services.

For the foregoing reasons respondent submits that the allegations set forth in the third party complaint are not sufficient for the institution of an economic enforcement proceeding by the Director of the Bureau of the Enforcement.

Respectfully submitted,

STROOCK & STROOCK & LAVAN
Attorneys for Respondent

By: John M. Gibbons

John M. Gibbons
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: 293.1990

ANSWER OF DOMESTIC AIR EXPRESS, INC.

REA EXPRESS, INC.	:	
v.	:	Docket 24810
DOMESTIC AIR EXPRESS, INC.	:	

ANSWER OF DOMESTIC AIR EXPRESS, INC.
TO COMPLAINT OF REA EXPRESS, INC.

On October 6, 1972, REA Express, Inc. (REA) filed a Complaint against Domestic Air Express, Inc. (DAX) by which it requests Board action ordering DAX to cease and desist from the use of the term "air express". Pursuant to the provisions of Rule 204(b) of the Rules of Practice, DAX respectfully submits the following as its Answer to the instant Complaint.

I. ANSWER TO SPECIFIC COUNTS

1. DAX admits the allegations of Paragraphs 1 and 2 of the Complaint.[1/]

2. DAX is without knowledge of the accuracy of the allegations made in Paragraph 3 of the Complaint.

3. DAX admits the allegation of Paragraph 4 of the Complaint.

4. DAX denies the allegations of Paragraphs 5 and 6 of the Complaint.

5. DAX is without knowledge of the accuracy of the allegation made in Paragraph 7 of the Complaint.

1/ DAX's principal place of business, however, is 335 Valencia Street, San Francisco, California 94103, and not the New York address listed in the REA complaint.

6. DAX denies the allegations made in Paragraph 8 of the Complaint.

II. AFFIRMATIVE DEFENSES

1. REA IS ESTOPPED FROM REQUESTING RELIEF SOUGHT IN ITS COMPLAINT

Unreasonable delay in enforcing a right, coupled with a material disadvantage to the party against which enforcement is now sought, are the two elements comprising estoppel by laches. Patently, both essential factors are evidenced in the REA Complaint. By any measure, REA's 16 years of inaction must constitute undue delay in asserting its alleged right to exclusive use of the term "air express". DAX first received air freight forwarder authority from the Board in 1956 and has been operating under its present name since that time. REA's argument that it was somehow prevented from pursuing its legal remedies by previous ownership[2/] is shown to be patently specious in the light of its own acknowledgement that the alleged impediment was removed over three years before the filing of this Complaint. DAX's detrimental reliance upon REA's inaction is equally apparent. DAX has invested a number of years and thousands of dollars in promoting its name and shipper identity. To allow REA to base an action upon an alleged right which it has permitted to lie dormant for many years would work a severe economic hardship on DAX. Thus, this combination of undue delay and extreme disadvantage, clearly requires the application of the principle of estoppel to the present situation.

2/ Were it in fact so precluded, its proper legal recourse lies against the former owners not against DAX.

2. REA COMPLAINT LACKS ANY ALLEGATION OF ACTUAL HARM.

Despite the fact that DAX has operated under its current name for 16 years, REA makes no attempt to allege that it has suffered any degree of actual harm. If in fact DAX's use of the term "air express" is, as alleged, "inherently likely to confuse Air Express customers of REA and make them believe that DAX's services are really those of REA",[3/] then, patently, REA would be able to document economic harm. Inability to do so exposes REA's effort as no more than a frivilous Complaint deserving summary dismissal.

Furthermore, DAX submits that it would be unjustly prejudiced were it forced to undergo any further expense in order to defend itself against a Complaint which REA has no legal right to pursue, and in which REA is unable to allege even an iota of actual harm.

WHEREFORE, Domestic Air Express, Inc. answers the material allegations as listed herein, and denies the ultimate conclusion of the Complaint. Further, DAX expressly requests that the Complaint be properly dismissed.

Respectfully submitted,

/s/ J. W. Rosenthal
J. W. Rosenthal

/s/ Joel Stephen Burton
Joel Stephen Burton

Attorneys for Domestic
Air Express, Inc.

November 10, 1972

3/ Complaint of REA, p. 3, para. 6.

VERIFICATION

I, Joel Stephen Burton, having been duly sworn according to law, verify that I have read the foregoing Answer and know the contents thereof, and that the matters and things therein are stated on information and belief and that I believe then to be true.

Joel Stephen Burton

Attorney for
DOMESTIC AIR EXPRESS, INC.

CITY OF WASHINGTON

DISTRICT OF COLUMBIA

Sworn to and subscribed to this 10th day of November, 1972, before me, a notary public of the District of Columbia.

Notary Public

My Commission Expires Feb [illegible]

LETTER OF RICHARD J. O'MELIA TO PETER G. WOLFE

LETTER OF RICHARD J. O'MELIA TO PETER G. WOLFE

Dear Mr. Wolfe:

Re: REA Express, Inc. v. Domestic Air Express, Inc., Docket 24810; REA Express, Inc. v. Wings and Wheels Express, Inc., Docket 24811.

Pursuant to Rule 205 of the Board's Rules of Practice in Economic Proceedings (14 CFR 302.205), I hereby advise you that, for the reasons set forth below, I have determined it would not be in the public interest to institute an enforcement proceeding upon the allegations set forth in the above-referenced complaint.

Introduction

By complaints filed with the Board on October 6, 1972, REA Express, Inc. (REA) charged that Domestic Air Express, Inc. (DAX) and Wings and Wheels Express, Inc. (Wings) by the use of certain trade names which were "inherently likely to confuse Air Express customers of REA and make them believe that [the respondent's] services are really those of REA" were engaged in unfair methods of competition within the meaning of section 411 of the Federal Aviation Act of 1958, as amended (Act). REA

requested that the Board order each respondent to cease and desist from further use of its allegedly confusing trade name.

Both respondents have answered the complainant's charges and have denied any confusion of names and have further alleged that the complainant is estopped by laches from even requesting the relief it seeks.

The Issue

The issue between the parties, raised by the REA complaint, must be viewed as whether or not a likelihood of substantial public confusion, of identity between the complainant and the respondents, exists due to a similarity of corporate names used by them which will subject a substantial number of members of the public to inconvenience and injury.

The Law

Section 411 of the Act deals with "unfair methods of competition" and "unfair or deceptive practices" in air transportation or the sale thereof and empowers the Board to issue an order to cease and desist against an air carrier, et al., if it finds after notice and hearing that such air carrier is engaged in such practices or methods of competition. 1/ This case is primarily concerned with

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1/ See American Airlines, Inc. v. Air America, Inc., et al., Order No. E-7645, dated August 18, 1965, at 3 (mimeo).

the law of unfair competition as it applies to the question of prohibited similarity in the use of a name by an air carrier. The Board has dealt with just such a question under section 411 proceedings in three past cases. 2/ The law will protect against unfair competition by the use of a corporate or trade name deceptively similar to that of a prior user. A company has a right to the protection of its name against injurious use thereof by another company. Such use may constitute both a private harm and also one affecting the public interest.

The proper forum for a company desiring to protect itself against any private harm arising from any improper infringement upon its good name is in the courts. However, where the company is an air carrier and where the disputed use of the name has the capacity to confuse or deceive the public, the Board has jurisdiction. The Board has the responsibility of safeguarding the public interest against unfair and deceptive methods of competition under section 411 and it is now established that a confusing similarity of names between two air carriers involves a method of

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2/ North American Airlines, Section 411 Proceeding, 18 CAB 96, decided November 4, 1953 (hereinafter cited as North Am.); Air America, Inc., Section 411 Proceeding, 18 CAB 810, decided June 24, 1954 (hereinafter cited as Air Am); Trans International Airlines, Inc. v. Texas International Airlines, Inc., Order 73-3-103, Docket 20875, dated March 27, 1973.

competition which can support a finding of a violation within the meaning of section 411. 3/ Section 411 was not designed for the purpose of protecting the private rights of an individual carrier except to the extent of regulating competition between the various air carriers. The section is concerned not with the protection of injured competitors but rather with protection of the public interest, whether or not the interests of honest competitors are also involved. 4/ The Board will act under section 411 without proof of fraud or a calculated attempt to deceive the public and in the absence of direct competition or actual diversion of trade or any private harm. 5/ Further, it need not be proven that the aggrieved carrier has acquired any secondary meaning in its name. 6/ But the fact that a company, with a geographical word for its name, is not the exclusive user of the word is not a bar to the acquisition of secondary

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3/ American Airlines, Inc. v. North American Airlines, Inc., et al., 351 U.S. 79, 86 (hereinafter cited as American Airlines).

4/ American Airlines at 83 & 85; North Am, at 113; Air Am. at 837 & n. 55.

5/ Air Am., at 831 & 836; American Airlines at 86.

6/ A corporate or trade name acquires secondary meaning, and hence becomes entitled to protection, when the public associates it with a specific company; such typically occurs in a name containing a word or words of geographical origin when by long use in connection with the business of a particular company, the words come to be understood by the public as designating the business of that company. Although secondary meaning need not be established to warrant relief under section 411 "in a case of demonstrated and substantial name confusion", where it does exist, it makes the existence of likelihood of confusion "more readily determinable". Air Am. at 840; North Am. at 101.

meaning. 7/ An argument of estoppel will not work against the Board's safeguarding of the public interest under section 411. 8/

What need be shown in a case of name confusion is that a likelihood of substantial public confusion of identity between the parties exists, due to a similarity of names used by them, which will confuse and mislead a substantial number of members of the public and thus subject them to inconvenience and injury. The gist of the problem is alleged public confusion between the carrier parties.

Actual as well as threatened confusion will prompt action under section 411. The determining factor for making a case under section 411, is not that people have actually been confused but that there is a likelihood of that happening; a remedy under section 411 depends not on the fact that the public has been confused but on the probability that they may be confused, and evidence that they actually have been confused is of importance only as tending to show that if the respondent's use of its name is permitted to continue, it probably will lead to confusion. 9/ And most importantly, the public confusion must be substantial. 10/

7/ Air Am. at 837-838.

8/ Air Am. at 812.

9/ Air Am. at 838 & n. 62; Southwest Airways, Name Change, 24 CAB 818, 820; Board Economic Regulations, EDR-39, dated November 13, 1961, at 4 (Notice of Proposed Rule Making for New Part 215).

10/ See North Am. at 97, 99; Southwest Airways, supra, note 9; Bonanza-Pacific-West Coast Merger Case, Order E-26625.

The two names may be so essentially similar that the likelihood of potentially substantial public confusion can be inferred from that fact alone. But apart from that situation, meeting the burden of establishing a likelihood of confusion requires proof of instances of confusion that are frequent, common, and persisting over a considerable period of time, not sporadic, isolated or de minimus. 11/ The public confusion must, above all, be sufficient to justify the Board in finding that it would be "in the interest of the public" to order the respondent to cease and desist from using its name. The public interest involved must be "specific and substantial." 12/

The Facts

In apparent support of its charges against the respondents, REA presents its long time use of the term "Air Express"; that it has spent substantial sums in advertising the term; the term describes a unique and exclusive air transportation service; the term has acquired a secondary meaning; REA has been granted the service mark "Air Express" by the U. S. Patent Office; and the operation of the respondents are directly competitive with those of REA. However, REA's basic allegation is that use of the name "Domestic Air Express" by DAX and use of the

11/ See Air Am. at 824, 837, 840; North Am. at 99; Southwest Airways, supra, note 9.

12/ Federal Trade Commission v. Klesner, 280 U.S. 19, 28 (1929); American Airlines, at 83; Air Am. at 840.

the name "Air Express International" as a d/b/a by Wings is "inherently likely to confuse" Air Express customers of REA and make them believe that the services of the particular respondent are really those of REA (emphasis supplied). REA offers no evidence of any actual name confusion.

Discussion

REA has not established that the names in issue are so inherently confusing that no proof of actual confusion is necessary and that the common sense of the matter suggests that substantial confusion is likely to occur. The Board had an opportunity to screen the proposed names of the respondents for the existence of just such an inherently confusing name situation when they were presented to the Board for issuance of operating authority; it found no such situation to exist and accordingly issued operating authority to the respondents under their present names. 13/ Even assuming, arguendo, that the Board did fail to so screen the names in issue, we, upon our review, find the names are sufficiently dissimilar so as to refute any claim

13/ The Board, under section 202.8 of its Regulations ("Business name of air carrier") prior to September, 1963 and Part 215 (Names of Air Carriers and Foreign Air Carriers) adopted in September, 1963, will allow an air carrier to use a certain name only if it finds that the use of such a name is not "contrary to the public interest."

of inherent confusion of the public. 14/

Because the names in issue here have been in use by the parties (or their predecessors) for no less than 17 years, 15/ the pertinent discussion of any alleged confusing similarity of names should center around actual instances of same. After a period of 17 years, it must be assumed that if the likelihood of confusion alleged by REA was real and substantial it would have now manifested itself. Yet REA fails to present a single instance of actual confusion. 16/ And what REA has presented, while not itself being direct evidence of actual public confusion, does not go to support the likelihood of public confusion.

14/ By Order 73-3-103, in Docket 20875, the Board recently concluded, inter alia, that use of the names "Texas Airlines, Inc." and "Trans International Airlines, Inc." by respective carriers was not likely to cause substantial public confusion. (The two names have the same number of words, the same number of letters in each word, three out of the four words are identical and the dissimilar words begin and end with the same letters--T and S). We not from recent REA advertisements that it uses the term "REA Air Express" (emphasis supplied) when referring to its service which will serve to distinguish it from the respondents. We also note several other air freight forwarders that include the term "Air Express" (Astro Air Express, Inc., July 1968; Rennie Footner Air Express Service, May 1966; 44 Air Express Systems, Inc., June 1971; Wells Fargo Air Express, Inc., November 1971).

15/ DAX's operating authority became effective on June 12, 1956. The other two parties have authority dating back to 1948.

16/ Efforts on the part of REA in collecting such available instances will be assumed, at least since circa August, 1969 when railroad ownership of REA was terminated; the railroads had allegedly prevented REA from filing complaints against users of the term "Air Express" (see para. 7 & 8 of REA complaints).

Conclusion

While an order to cease and desist against the respondents' continued use of their names after more than 17 years of promotion would be an awesome use of the Board's powers and one that would have a tremendous adverse economic effect on the respondents, the protection of the public interest is of far greater importance in the balance. However, the complainant has failed to present a prima facie case involving a substantial danger of public confusion.

For the foregoing reasons, I have concluded that institution of an enforcement proceeding upon the allegations in the REA complaint is not in the public interest and is not otherwise warranted. Your attention is invited to Rule 205(c) of the Board's Rules of Practice by which the complainant herein is allowed twenty (20) days after service of this letter in which it may file a motion with the Board requesting a review of my decision not to institute an enforcement proceeding. In the event you do not choose to seek review, this letter shall be deemed an order of the Board dismissing the complaint in accordance with Rule 205(b) unless review is initiated by the Board.

Sincerely yours,

Richard J. O'Melia
Director
Bureau of Enforcement

MOTION FOR REVIEW

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

REA EXPRESS, INC. v. DOMESTIC AIR EXPRESS, INC.	Docket 24810
REA EXPRESS, INC. v. WINGS AND WHEELS EXPRESS, INC.	Docket 24811

MOTION FOR REVIEW

Preliminary Statement

Pursuant to Rule 205(c) of the Board's Rules of Practice, REA Express, Inc. ("REA") hereby files its Motion for Review of staff action, viz., the letter of Richard J. O'Melia, Director, Bureau of Enforcement, dated June 8, 1973, advising REA that he would not institute an enforcement proceeding based on the above-referenced complaints.

In the complaints at issue, REA contended that it has provided Air Express services since 1927; it has spent substantial sums in advertising the term "Air Express"; the Board and its Administrative Law Judges have found the Air Express services provided by REA to be readily distinguishable from air freight services (Air Freight Forwarder Case, 9 C.A.B. 473(1948); Express Service Investigation, Docket 22388,

Initial Decision of Administrative Law Judge James S. Keith (1972)); REA has been granted Service Marks for "Air Exp[illegible]" by the U.S. Patent Office; and the use of the term "Air Express" in the names of respondents is inherently likely to confuse the public.

Mr. O'Melia found that the names were not inherently confusing (p.5), and that REA therefore had the burden of proof to show actual instances of confusion (p.6). He further "assumed" that REA has been collecting such information since August, 1969 (p.6, fn. 16).

I

Mr. O'Melia's conclusion that the names are not inherently confusing was based on very superficial analysis. He said that, unlike the recent Trans International Airlines, Inc. v. Texas International Airlines, Inc., Order 73-3-103, the names in question do not have the same number of letters. He also stated that REA uses "REA Air Express" in its advertisements, and that there are other air freight forwarders which use the the words "Air Express" in their name.

This conclusion can only be an exercise in pure speculation. In a dissent in Triangle Publications, Inc. v. Rohrlich, 167 F.2d 969 (2d Cir 1948), Judge Frank stated that:

> "our surmise [as to the likelihood of confusion] must here rest on 'judicial notice'. As neither the trial judge nor any member of this court is (or resembles) a teenage girl or the mother or sister of such a girl, our judicial notice apparatus will not work well unless we feed it with information directly obtained from 'teenagers' or from their female

> relatives accustomed to shop for them. Competently to inform ourselves, we should have a staff of investigators like those supplied to administrative agencies."

Despite his staff of investigators, Mr. O'Melia did nothing to investigate the complaint, but merely speculated as to the likelihood of confusion.

Whatever relevance Mr. O'Melia's argument might have where the sole question was whether the public is confused as to which company it is dealing with, it is not adequate to the key issue herein. As REA stated in its complaint, only REA provides "Air Express" services which feature priority under C.A.B. Agreement 17935 between REA and the certificated airlines. We believe that the use of "Air Express" in the names of air freight forwarders inherently must make the public believe that these forwarders are rendering the service which only REA has C.A.B. authority to render. No comparison of the letters in names can obviate the fact that by use of the words "Air Express" in their names, DAX and Wings and Wheels are holding out to provide Air Express services which they have no authority to perform. This is inherent confusion to which Mr. O'Melia has not addressed himself.

II

As for the requirement of proof, of public confusion, it appears that Mr. O'Melia has confused the allegations in a complaint with the requirements of proof at a hearing. He cites North American Airlines, Section 411 Proceeding, 18 C.A.B. 96 (1953) and Air America, Inc. Section 411 Proceeding,

18 C.A.B. 810 (1954), for the proposition that the complainant must show actual instances of confusion (p.4). However, in both of those cases proof of those instances of confusion were introduced at a hearing, after the complaints were docketed. Clearly a hearing is the appropriate forum for proving such facts. Section 1002(a) of the Federal Aviation Act permits complaints to be discussed without hearing only if it "does not state facts which warrant an investigation of action..." As Davis says:

> "Adjudicative facts - facts pertaining to a particular party - normally ought not to be found without allowing the party a chance to rebut, explain, and cross-examine." 1 K. Davis, Administrative Law Treatise 506 (1950).

The complaint clearly involves adjudicative facts, i.e. facts involving acts of the parties to this proceeding. It also directly affects their property rights, i.e. the use of their names. Therefore, a hearing is required. Fugazy Travel Bureau, Inc. v. C.A.B., 350 F.2d 733 (D.C. Cir 1965). Moreover, while the Board may dismiss the complaint because it does not state facts which warrant an investigation, it may not dismiss a complaint without an investigation because the complainant has failed to prove certain facts -- for the very purpose of an investigation or to give a complainant an opportunity to prove his contentions.

> "No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it." Continental Collieries v. Shober, 130 F.2d 631 (3rd Cir. 1942).

Mr. O'Melia, by refusing to docket the complaints, has precluded REA from producing at a hearing the type of evidence produced in the cases cited by Mr. O'Melia.

If Mr. O'Melia believed that REA's complaints were insufficient, he should have advised REA of the deficiency and required REA to amend its complaint. This procedure is set forth in Rule 203 of the Board's Rules of Practice. He did not do so.

Should there by any doubt in the Board's mind whether REA's complaints are sufficient, REA hearby moves to amend its complaints nunc pro tunc to add the following language:

> "The use of the words 'Air Express' has resulted in actual confusion on the part of shipping public between the services of REA and the services of the respondents."

A verified amendment to the complaints is set forth in Exhibit A. The amendment should be allowed because, as is made absolutely clear from Exhibit B, the amendment is meritorious. In addition, REA did not earlier amend the complaint because REA certainly had no reason to believe that the Bureau of Enforcement would not order REA to amend its complaint rather than summarily dismissing it.

III

REA believes that the similarity of the names in question was such that they are inherently confusing. It therefore saw no necessity of compiling a list of examples

of confusion. However, REA has attempted to collect a few examples of such confusion in the limited time available since it received Mr. O'Melia's letter. An affidavit setting forth a description of such examples is attached as Exhibit B.

Offer of Proof

We believe that the attached affidavit presents adequate instances of substantial confusion. In the event that the Board disagrees, however, and we are given the opportunity to do so, we will submit the following proof at a hearing:

1. REA employees have been made aware, in the regular course of their business, that shippers have sent goods on Domestic Air Express and Air Express International when they intended to send goods on REA Express.

2. REA employees have been made aware, in the regular course of their business, that shippers have sent goods on Domestic Air Express and Air Express International when they intended to use Air Express services, as defined in the Air Express Agreement.

3. REA employees have been made aware, in the regular and ordinary course of their business, that local telephone companies have directed shippers to Domestic Air Express and Air Express International, when they asked for Air Express.

4. REA employees have been made aware, in the regular and ordinary course of their business, that the U.S. Postal Service has sent REA mail to AEI and DAX.

5. Shippers will testify that they have sent goods on Domestic Air Express and Air Express International which they intended to send on REA Express.

6. Shippers will testify that they have sent goods on Domestic Air Express and Air Express International when they intended to use Air Express services, as defined in the Air Express Agreement.

7. A survey, designed by agreement of all parties at the Prehearing Conference, will show that there is substantial shipper confusion between the Air Express services of REA and the services of freight forwarders using the words "Air Express" in their name. 1/

If Mr. O'Melia's letter is affirmed as an order of the Board, it will deny REA the opportunity to be heard in regard to the above adjudicative facts.

1/ If a hearing is ordered, REA expects that the specific evidence to be presented will be decided upon at a Prehearing Conference. REA expects that all interested parties, including those other air freight forwarders who use "Air Express" in their name would have a right to intervene. REA did not file a complaint against these air freight forwarders because it believed that Domestic Air Express and Air Express International were the major offenders, and it has been awaiting C.A.B action on this complaint before filing complaints against others.

CONCLUSION

For the reasons above stated, the Board should either (1) order REA's Complaint docketed for hearing, so REA can submit proof of public confusion at that time, or (2) remand this proceeding to the Bureau of Enforcement to permit REA to submit detailed proof of public confusion.

Respectfully submitted,

Peter G. Wolfe

Peter G. Wolfe

Of Counsel

Arthur M. Wisehart

CERTIFICATE OF SERVICE

I hereby certify that I this date served the above Motion for Review upon all Parties to this proceeding by first class mail.

Peter G. Wolfe

Peter G. Wolfe

June 26, 1973

EXHIBIT A

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

REA EXPRESS, INC. v. DOMESTIC AIR EXPRESS, INC.	Docket 24810
REA EXPRESS, INC. v. WINGS AND WHEELS EXPRESS, INC.	Docket 24811

AMENDMENT TO COMPLAINT

REA Express, Inc. ("REA") hereby amends its complaints to add the following paragraph:

> "The use of the words 'Air Express' has resulted in actual confusion on the part of the shipping public between the services of REA and the services of the respondent."

Respectfully submitted,

Peter G Wolfe

Peter G. Wolfe
Attorney

VERIFICATION

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

PETER G. WOLFE, being duly sworn, deposes and says:

That he is attorney for REA Express, Inc.; that he

has read the above amendment to the complaint and knows the contents thereof, that the things stated therein are true of his own knowledge except such matters therein stated on information and belief, and as to those matters he believes them to be true.

Peter G. Wolfe

Peter G. Wolfe

Sworn to before me this
25th day of June, 1973

Henry Fulle

HENRY FULLE
Notary Public, State of New York
Qualified in Putnam County
Commission Expires March 30, 1974

EXHIBIT B

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

BERNARD R. DRAVIS, being duly sworn, deposes and says:

1. I am Director, Air and International Services, REA Express, Inc., 219 East 42nd Street, New York, New York.

2. On June 12, 1973, I received a copy of the letter of Richard O'Melia to Peter G. Wolfe, dated June 8, 1973.

3. In the regular and ordinary course of business, I immediately requested reports from REA local offices as to whether there had been any instances of confusion between REA Air Express and either Domestic Air Express or Air Express International. I received the following responses:

Boston - A customer called REA in reference for charges to Ottawa for which he had been billed which he thought were too high. After talking with an REA employee, he realized that he had an Air Express International statement, and the shipment was not forwarded by Air Express as he had intended.

Mr. Normandeau, Manchester, N.H. called REA to trace a shipment moving from Baltimore to Manchester, N.H. on Waybill Number 176277. The REA customer service clerk called Air Express International and determined that it was their shipment. The customer requested and

thought that the shipment moved REA Air Express.

Buffalo - REA gets many requests to trace shipments and discovers that they are moving via Air Express International or Domestic Air Express.

Chicago - REA is often called to trace Air Express International shipments. Many draymen attempting to deliver freight are also confused, as is the U.S. Postal Service.

Cleveland - The following companies have been confused in that they prepared both the ExpressCo pickup receipt and the Air Express International waybill on shipments they intended to send via ExpressCo.

> F. Mandato, Picker X-Ray Co., 600 Alpha Drive, Cleveland, Ohio; Rocky Rutti, Otis Material Handling, 800 Baker Ave., Cleveland, Ohio; Mr. Ward, E.T.C. Division of ITT, 990 East 67th Street, Cleveland, Ohio.

Colorado Springs - Mr. Jack Garder of Timkin Bearing, Colorado Springs, Colorado, told an REA employee that he often uses REA's International Division, Air Express International. He said he assumed it to be REA because of the name.

Dayton - Mrs. Briggs of ITT Jacoby Company, Springfield, Ohio, called REA on June 14, 1973, to trace a shipment only to learn that it actually moved by Air Express International. She stated

that she was not aware of the difference.

Houston - REA receives several phone calls a month from customers who think REA and Air Express International are the same.

Indianapolis - Caterpiller Tractor has advised REA that some of their consignees have confused REA with Air Express International and Domestic Air Express.

Los Angeles - During the week of June 11, Delmar Engineering of Los Angeles called REA for a trace on a shipment that had moved Air Express International.

A test conducted in April, 1973, of airlines customer service personnel in California showed that 60% of them were confused over the relationship between Domestic Air Express, Air Express International, and REA Air Express.

During the week of June 4, 1973, a woman called our Hollywood, California, office and said that someone had given her the REA number and insisted it was Wings and Wheels.

Louisville - REA customer service personnel have received telephone calls from the following shippers who are confused between REA and Domestic Air Express and Air Express International: Tube Turns, Rohm Hass, Reynolds Metals, C. Lee Cook.

Miami - On June 12, 1973, a consolidation for ExpressCo from Dallas was consigned Air Express Co., Miami, and was picked up in Miami by Air Express International. On June 16, REA received the shipment on Dallas Waybill No. 002DAL07507614.

On June 8, 1973, REA traced shipment 41-60-14 from France to Aero Systems, Miami, only to learn that it was an Air Express International shipment.

In addition, REA often receives the mail for Domestic Air Express and Air Express International, and they receive REA's mail.

Milwaukee - Many shippers mistake Air Express for Air Express International. There is also confusion in delivery of U. S. mail.

Minneapolis - REA receives an average of 3 inquiries daily regarding Air Express International shipments. It also receives Air Express International's telephone bills every month, and receives bills from various truck lines for Air Express International.

Nashville - The McCord Corp. of Cookeville, Tennessee recently gave an Air Express shipment destined to San Juan to Air Express International in error. Mr. Osterberg, Genesco Shoe Co. has also given Air Express shipments to Air Express International.

Newark - The former Newark Manager of Air Express International, Mr. William Watts, told REA's Air Express Manager at Newark, Mr. William Brophy, that Air Express International received 10-12 telephone calls a day meant for REA. Mr. Brophy telephoned the New Jersey Telephone Company information operator, and was told that their internal listing sets forth the number of Air Express International as a subordinate listing under REA Express. This was affirmed by Mrs. Willis, Assistant Manager of Operator Service, for the New Jersey Telephone Company.

New Orleans - REA gets phone calls and visits from customers looking for Air Express International.

Philadelphia - REA gets frequent phone calls and visits from customers looking for Air Express International. In addition, REA gets mail sent to Domestic Air Express and Air Express International and vice-versa.

Pittsburgh - Ward Miller, Westinghouse Computer and Instrumentation, Blawnox, Pa.; and Bill Holdnack, General Electric, Erie, Pa., have called REA on waybills which belonged to Air Express International or Domestic Air Express. Various small shippers in Altoona, Pa. were uncertain of the differences between REA and DAX and AEI.

St. Louis - A shipment of mounted fish was sent to Gary Benefield, 517 Lavendel, Kirkwood, Mo. 63122 on May 31, 1973 from Fort Lauderdale, Florida. REA was asked by the consignee to trace it. The consignee was definitely under the impression that the shipment was to be transported via REA Air Express. Upon investigation, it was determined that the crate was shipped via Air Express International.

In addition, there are many customers who telephone or come to REA for shipments that have moved on Air Express International. Finally, REA continually receives Air Express International mail in error.

San Diego - Lee Peterson, REA manager at San Diego, was previously manager for Domestic Air Express at San Diego. He stated that at that time Domestic Air Express received an average of one call per week from people who asked for "Air Express." The answer Mr. Peterson reports he and other DAX personnel gave was, "Yes, this is Domestic Air Express, may we help you." In 75% of the cases, they secured the business for DAX. This included $3,000 one month from one company, Maxwell Lab of San Diego.

San Francisco - Many customers mistake Air Express International for Air Express. There is also confusion in delivery of U.S. mail.

San Francisco - REA has received letters mailed to Air Express International.

Seattle - Customers have called REA on shipments they sent on Air Express International.

Washington - On June 19, 1973, REA received a telephone call from Mr. Godwin, 6212 Vern Ave., Bethesda, Md.; asking REA to trace an Air Express International shipment No. 1747823.

Bernard R. Dravis

Sworn to before me this
25th day of June, 1973

HENRY FULLE
Notary Public, State of New York
Qualified in Putnam County
Commission Expires March 30, 1974

ANSWER OF DOMESTIC AIR EXPRESS, ING. TO MOTION FOR REVIEW

BEFORE THE

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

REA EXPRESS, INC.	
v.	Docket 24810
DOMESTIC AIR EXPRESS, INC.	

ANSWER OF DOMESTIC AIR EXPRESS, INC. TO MOTION FOR REVIEW

By letter dated June 8, 1973, the Director, Bureau of Enforcement, (hereinafter referred to as the "Director") notified REA Express, Inc. (REA) of his conclusion that the above-captioned complaint failed to present reasonable grounds to believe that the use by Domestic Air Express, Inc. (DAX) of the corporate name under which it has conducted business for seventeen years is likely to produce substantial public confusion. Thus, the Director determined that the institution of an enforcement proceeding on the basis of the REA complaint was not warranted.

REA has now moved for a review of that determination, requesting that the Board either docket the complaint or remand the matter to the Bureau of Enforcement for further consideration. DAX opposes any grant of the relief requested by REA and urges that the Board issue an order dismissing the complaint.

REA's primary contention is that the Director erroneously assumed that the complainant is obligated to prove the allegations prior to the docketing of a formal proceeding. REA thus mischaracterizes the Director's logical and well explained rationale. The Director noted that in weighing the reasonableness of the allegations made by REA he had to consider inter alia such factors as (1) the inference of consistency with the public interest which is raised by the Board's authorization to DAX to conduct a freight forwarding business under that name; (2) the sixteen-year period during which DAX conducted such business without objection from either REA or the CAB; (3) the limited similarity between the two names; (4) the Board's authorization of at least five other freight forwarders to conduct operations under names containing the words "air express"; and (5) REA's failure to provide specific examples of substantial public harm or confusion. In these circumstances the Director's conclusion was clearly unavoidable.

REA's reliance upon Continental Collieries v. Shober, 130 F.2d 631 (3rd Cir. 1942) as supportive of its right to an administrative hearing is clearly misplaced. Continental Collieries involved the issue of dismissal for failure to state a claim, of a civil complaint filed under the Federal Rules of Civil Procedure. Indeed, the very language of the Circuit Court cited by REA evidences the essential difference between the Rules of Civil Procedure and the CAB Procedural Regulations which require that the Director be of the opinion that "reasonable grounds" exist for believing that the Act is being violated.[1/]

Nor does the mere assertion of a factual dispute in a complaint somehow work to guarantee a right to hearing. For, were this to be the case, virtually any complaint, no matter how obviously ill-founded, would necessitate a full evidentiary hearing. Section 1002(a) of the Act requires that the complaint state facts which warrant an investigation. REA's complaint, viewed in the context of the seventeen-year history of the use of the name Domestic Air Express, has not met this test.

1/ Rule 206. Whereas under the FRCP, Rule 54(d) provides for costs to be allowed to the prevailing party, the Federal Aviation Act contains no similar provision. Thus, it is obvious that if the public and innocent parties are to be protected from bearing the costs of hearing and defending against frivolous charges, some form of prior administrative determination as to the possible merits of the complaint is essential.

REA has made a belated attempt to salvage its complaint by proffering as Exhibit B to the subject motion what purport to be "specific" examples of "substantial confusion." In fact in only eight of the approximately thirty instances recited does a reference to DAX even appear. Two of those eight involve an unspecified amount of misdirected mail; others are no more than vague assertions of confusion over corporate relationships or misdirected phone calls. None of these "examples" lends evidence to an allegation of substantial confusion or public harm. And, as stated in Order 73-3-103, "...the vindication of private rights, the protection of the carrier's mark, and the insulation of the carrier from the annoyance of misdirected telephone calls and mail do not, per se, constitute actionable charges under section 411. There must be a specific and substantial showing of harm to the public.[2/] REA's complaint, either as originally filed or as amended by the subject motion, fails to make such a showing. An Order of dismissal is clearly appropriate.

2/ Trans International Airlines Inc. v. Texas International Airlines, Inc., Order 73-3-103, pp. 27-28.

WHEREFORE, Domestic Air Express, Inc. respectfully requests that the Board issue an Order dismissing the complaint of REA Express, Inc.

Respectfully submitted,

s/ J. W. Rosenthal
J. W. Rosenthal

s/ Alfred J. Eichenlaub
Alfred J. Eichenlaub

Attorneys for
DOMESTIC AIR EXPRESS, INC.

July 13, 1973

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Answer upon REA Express, Inc. and Wings and Wheels Express, Inc. in properly addressed, postage prepaid envelopes.

s/ Jane E. Di Salvo
Jane E. Di Salvo

July 13, 1973

ANSWER OF WINGS AND WHEELS EXPRESS, INC. TO MOTION FOR REVIEW

INTRODUCTION

By complaint filed on October 6, 1972, REA Express, Inc. (REA) requested the Board to order Wings and Wheels Express, Inc. (Wings & Wheels) to cease and desist from using the trade name Air Express International in its international air freight forwarding operations. REA's basic allegation was that "the use of the name Air Express International by Wings and Wheels is inherently likely to confuse Air Express customers of REA and make them believe that Wings and Wheels' services are really those of REA."

Wings & Wheels[1] responded to the complaint by showing, among other things, that:

1. the name Air Express International had been continuously used by respondent and its predecessor corporations in providing air freight forwarding services since 1948, and

2. in prior proceedings the CAB has determined that the name Air Express International is not likely to cause public confusion.

By letter dated June 8, 1973, the Director of the Bureau of Enforcement decided that it would not be in the public interest to institute an enforcement proceeding upon the allegations set forth in the complaint. The basis of this decision was that the Board had previously screened respondent's name for the existence of an inherently confusing name situation and had found none to exi: Furthermore, the Director reasoned that if the names were inherently confusing

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1. On June 6, 1972, respondent applied to the Board for permission to change its name to Air Express International Corporation and to operate its domestic as well as international air freight forwarding service under that name. Action on that application has been deferred pending resolution of the present complaint. However, acting on instructions from the Bureau of Operating Rights, respondent has amended its Articles of Incorporation to change its name to Air Express International Corporation.

that fact would have manifested itself in instances of actual confusion during the more than 25 years that the names have been in use. Under these circumstances, since no allegations of actual confusion were presented the Director concluded that REA's complaint failed to present a prima facie case involving a substantial danger of public confusion.

I.

In its motion for review REA asserts that the Director's conclusion was based on superficial analysis and pure speculation. This assertion focuses on observations made by the Director showing points of dissimilarity between the names and misconstrues the real basis of the decision.

One of the important distinctions between this case and other name confusion cases is that the names in question here have been in continuous use for more than 25 years. During this period the Board, on several occasions, has considered the possibility that the use of the name Air Express International would be likely to cause public confusion. No such finding has ever been made.[1]

Furthermore, because of the long use of the names any confusing similarity between REA Air Express and Air Express International would undoubtedly have been evidenced by instances of actual confusion.

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1. See Respondent's answer to the complaint, First Defense, pages 2-4.

There being no basis for a finding of actual confusion presented in the record of this case, the Director rightly concluded that the names were not inherently likely to cause public confusion.

Thus, contrary to REA's assertion, the Director's decision was well reasoned and fully supported by the record.

II.

In its motion for review REA further asserts that the Director confused the pleading requirements for assertion of a valid claim with the requirements for proof of that claim, and that REA was thus improperly denied a hearing on its complaint. This assertion misconstrues both the essential elements of a claim of name confusion and the standards for determining the necessity for an administrative hearing.

To make out a case under Section 411 either of two tests must be met. First, the names may be so essentially similar that the likelihood of potentially substantial public confusion can be inferred from that fact alone. Air America, Inc., Section 411 Proceedings, 18 C.A.B. 810 (1954). To determine if this test has been met no facts other than those presented in the complaint need be examined. More importantly this test is inapposite here due to the length of time of actual use of the names in question.

Alternatively the complainant must present a basis for finding that substantial public confusion exists. Substantial confusion has been defined as that which is frequent, common, persisting over a

considerable period of time and not sporadic isolated or de minimis North American Airlines, Section 411 Proceeding, 18 C.A.B. 96 (1953); Air America, Inc. Section 411 Proceeding, 18 C.A.B. 810 (1954); Trans International Airlines, Inc. v. Texas International Airlines, Inc., Order 73-3-103, Dkt. 20875, March 27, 1973. The allegations of the instant complaint raise no factual issues that, if proven, would meet the requirements of this test.

The Board has the authority to establish rules, such as Subpart B of the Rules of Practice, which bar those claims which do not meet threshold requirements.

In Upjohn Co. v. Finch, 422 F. 2d 944 (6th Cir. 1970) the Court, considering whether a full evidentiary hearing was required before an antibiotic drug could be removed under the regulations, stated:

> The Commissioner was authorized to demand a genuine and substantial issue of fact be presented as a prerequisite to an evidentiary hearing -- that is, Upjohn be required to demonstrate that it had available and was prepared to present proof of adequate and well controlled investigations meeting the statutory definition of substantial evidence, in support of its claims for the effectiveness of its drugs. 422 F. 2d at 955 (emphasis added).

Similarly the Supreme Court has upheld the Federal Communications Commission's authority to dismiss an application for a license without a hearing.

> As the Commission has promulgated its Rules after extensive administrative hearings, it is necessary for the accompanying papers to set

> forth reasons, sufficient if true, to justify a change or waiver of the Rules. We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing. United States v. Storer Broadcasting Co. 351 U.S. 192, 205 (1956).

Also on point is Dyestuffs and Chemicals Inc., v. Fleming, 271 F. 2d 281 (8th Cir. 1959) where it was held that an evidentiary hearing was not required when the asserted claim was legally insufficient. See also FPC v. Texaco, 277 U.S. 33, 39 (1964), and Pharmaceutical Manufacturers Association v. Richardson, 318 F. Supp. 301, 312 (D. Del. 1970).

Thus it is clear that where, as here, the complaint fails to present any basis for a finding of substantial actual public confusion, the Director of the Bureau of Enforcement may refuse to institute an enforcement proceeding without an evidentiary hearing.

REA's nunc pro tunc amendment to its complaint is likewise insufficient to necessitate an evidentiary hearing since it does not raise the issue of substantial public confusion required to maintain a claim of name confusion under section 411.

REA's reliance on Rule 203 is misplaced. Rule 203 is obviously intended to allow the amendment of technically deficient complaints. The construction which REA attempts to place on this rule which would require the Director to amend the factual assertions of all complaints so that they present valid claims, would negate the entire

procedure the Board has established for dealing with third party complaints. The Board clearly has the authority, as demonstrated by the above cited cases, to use procedures designed to weed-out claims which do not meet threshold requirements without an evidentiary hearing. Since the allegations of REA's complaint were so far short of the requirements of a valid claim under Section 411, the Director's action in dismissing the complaint under Rule 205 was clearly not an abuse of discretion.

III.

Air Express International Corp., respondent's predecessor was founded and began air freight operations in 1935. It and a related company, Air Express International Agency, Inc., were among the companies originally authorized by the Board to perform air freight forwarding services. Air Freight Forwarder Case, 9 C.A.B. 473 (1948); Air Freight Forwarder Case (International), 11 C.A.B. 182 (1950). Since that time respondent has continuously conducted air freight forwarding services under the name Air Express International. Due solely to respondent's efforts, the name Air Express International currently enjoys an excellent reputation in the air freight forwarding industry. This is demonstrated by the fact that respondent's international operations are second largest among all United States air freight forwarders.

Since respondent has performed air freight forwarding services under the name Air Express International for almost 40 years,

has developed a worldwide organization of subsidiary companies for international operations and has expended considerable effort and money in promoting its business, it would be inequitable to now deprive it of the use of the name Air Express International.

For the Board to order respondent to cease use of its name under these circumstances would require a finding of serious and immediate harm to the public resulting from the alleged confusion. If such a situation existed it would certainly have manifested itself in the prior Board proceeding which resulted in the issuance of operating authorizations to conduct air freight forwarding services under the name Air Express International. The possibility that the use of the name Air Express International by respondent would cause public confusion has been considered, and rejected, by the CAB, as required by Part 215 of the Board's Economic Regulations, as recently as 1970. To reopen this question for investigation on the basis of REA's complaint would not be in the public interest but would be a duplicative and wasteful expenditure of the Board's resources and an unwarranted burden on respondent.

The differences between respondent's and REA's operations further mitigate against the possibility of public confusion due to similarity of name. Respondent's customers are business and commercial firms who are not likely to be confused regarding the type of service they are purchasing. Over 3000 regular customers

account for approximately 80% of respondent's business. These are principally manufacturers and distributors of machines and machine parts, cosmetics, drugs, apparel, printed matter, electrical parts and advertising material. Respondent's sales efforts are directed toward business firms rather than the general public. In its advertising and sales respondent has never represented itself as other than an air freight forwarder nor has it represented that it is in any way associated with REA Air Express.

CONCLUSION

For the foregoing reasons respondent requests the Board to enter an order dismissing the complaint.

Respectfully submitted,

STROOCK & STROOCK & LAVAN
Attorneys for Respondent
Air Express International Corporation
Wings and Wheels Express, Inc.

By: John M. Gibbons
John M. Gibbons

CIVIL AERONAUTICS BOARD ORDER 73-8-134

This matter is before the Board on motion of REA Express, Inc. (REA) for review of the refusal of the Director of the Bureau of Enforcement to docket an enforcement proceeding in response to REA's formal conplaints against the respondent air freight forwarders. For reasons hereinafter set forth, the Board will affirm the Director's decision and order the complaints dismissed.

The complaints allege violations by the respondents of Section 411 which prohibits unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. They are directed to the use by the respondents of the words "air express" in their corporate or trade names.1/ Essentially, the contentions are that public confusion has resulted with respect to (1) carrier identity, and (2) character of service.2/

1/ Wings and Wheels does business as Air Express International in the conduct of its internation operations pursuant to an authorization under Part 215 of the Board's regulations granted in June 1970. This followed the Board's approval in January, 1970 of the merger of Wings and Wheels and Air Express International Corporation. Order 70-1-4 (January 2, 1970).

2/ The latter allegation rests upon the view that "air express" is a special type of service different from ordinary air freight forwarding, and that REA is the only carrier authorized by the Board to engage in "air express." While perhaps implicit in the complaint, the specific allegation of public confusion as to the character of service provided by the respondents is made for the first time on review.

Following receipt of answers in which the respondents denied actual or likely public confusion of any significance, the Director decided not to institute an enforcement proceeding and so advised the parties by letter dated June 8, 1973. In the final analysis, his decision rested on a determination that the complaints failed to set forth reasons for believing that the respondents' names were inherently likely to cause substantial public confusion, or that they had in fact caused such confusion. He concluded, therefore, that institution of an enforcement proceeding under Section 411 was not in the public interest.

The Board has carefully considered the complaints, answers, the motion for review, and the answer of Wings and Wheels to it.3/ Finding ourselves in agreement with the Director, we will order the complaints dismissed.4/

The question presented is whether it would be in the public interest for the Board to exercise its jurisdiction

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3/ Domestic Air Express did not file an answer to the motion for review.

4/ Attached to REA's motion for review is a proposed amendment to tis complaint, consisting of allegation of actual confusion and a supporting affidavit. REA requests that it be permitted to amend its complaint nunc pro tunc. For purposes of review the Board will treat the complaint as having been amended so as to include the material attached to REA's motion.

under Section 411, since "consideration of the public interest is made a condition upon the assumption of jurisdiction by the agency to investigate trade practices and methods of competition and determine whether or not they are unfair." American Airlines v. North American Airlines, 351 U.S. 79, 83 (1956). The "public interest" which will justify a proceeding must, moreover, be "specific and substantial" (id.). In terms of this case, then, the question is whether there are grounds for believing that the respondents' use of the words "air express" in their names has or will cause not just public confusion, but "specific and substantial" public confusion. We think not.

In our view, the fact that the words "air express" are common to the parties' corporate or trade names is insufficient to warrant an inference that the similarity of names, in and of itself, is likely to result in substantial public confusion warranting assumption of Section 411 jurisdiction. If we were to accept this thesis, it would lead logically to the conclusion that the words "air freight" render the names of any number of freight forwarders inherently confusing.5/ Indeed, one might just as readily say that there

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5/ A cursory review of the yellow pages of the 1973 Washington, D. C. telephone directory shows no less than ten different companies listed with those words in their names.

is reason to believe that the mere use of the words "air-lines" or "air lines" in the direct carriers' names is inherently confusing.

Nor are we persuaded that reason has been shown to believe that there has been actual substantial public confusion sufficient to warrant institution of a formal proceeding under Section 411. As the Director noted, the complaint itself set forth no reasons for believeing that there had been such confusion. Moreover, there is no blinking the fact that Wings and Wheels' predecessors have been operating under names which include the words "air express" since before the Civil Aeronautics Act became law in 1938, and they were among the first forwarders to receive authorization from the Board 25 years ago.6/ Domestic Air Express has been operating under that name for some 17 years. The absence of any complaint or other manifestation of significant public confusion during those years suggests that there is little reason to believe that there has been such confusion as would warrant institution of a proceeding looking to an order requiring the respondents to discontinue

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6/ As previously indicated, Wings and Wheels acquired Air Express International Corporation in 1970. That company, in turn, and a related one, Air Express International Agency, received operating authority in the Air Freight Forwarder Case, 9 C.A.B. 473 (1948), and the Air Freight Forwarder Case, (International), 11 C.A.B. 182 (1949).

use of their names.7/

The proposed amendment to the complaint and supporting affidavit submitted by REA with its motion for review likewise fail to convince us that there is a sufficient reason to assert the Board's jurisdiction under Section 411. Even the affidavit is general in nature, setting forth, for the most part, broad conclusions. It is singularly lacking in specifics. While it is true, as REA says, that it is not required to prove its case in its complaint, it is required to make a threshold showing of reasonable grounds for believing that a state of facts exists which warrants assumption of jurisdiction. REA's showing simply does not convince us that the respondents' use of the words

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7/ We have not overlooked REA's assertion that it was not "free" to complain until its ownership by the railroads terminated in August of 1969. REA appears to suggest that, but for this consideration, it would have complained sooner, the implication being that confusion had been a substantial problem prior to that date. Accepting at face value REA's contention that the railroads somehow prohibited it from complaining while they were in control, the fact remains that nothing was heard from REA for more than three years after the alleged constraints on its freedom to complain had been removed. Furthermore, the public has always been free to complain informally to the Board of service problems and has done so freely and frequently with respect to a wide variety of problems. So far as the Board has been able to ascertain, however, no complaints have been received growing out of confursion between REA and the respondents or other forwarders whose names include the words "air express."

"air express" in their corporate or trade names has caused, or is likely to cause, public confusion of sufficient substance to warrant commitment of the Board's staff and time resources to a formal proceeding.8/ There are many pressing matters facing the Board and its staff and, in the Board's judgment, its limited resources can be more profitably devoted to those problems than to REA's complaint.9/

8/ What has been said applies no less to the allegations of confusion as to character of service than to identity of carrier. Whatever might be thought of the allegation of inherent confusion from the use of the words "air express" in the name of a carrier which is not an "express company" in the historical and technical sense of that term, the lack of a manifestation of actual confusion in this respect during the 25 years before the complaint was filed and the generality of the affidavit lead us to the same conclusion with respect to a proceeding involving character of service as we reach with respect to one involving carrier identity. Moreover, there is presently pending a proceeding which presents, among other issues, the question "whether the existing concept of an iar express agreement between the direct air carriers and an express company should be maintained." Express Service Investigation, Order 70-7-110 (July 23, 1970). Without intimating any view as to the merits of that case, the Board believes it would be inappropriate to institute an enforcement proceeding based on alleged confusion between "air express" in the historic sense and the service of the respondents while a proceeding is pending to consider whether the existing concept of air express has validity today.

9/ While a few formal Section 411 proceedings have been instituted in the past, based on alleged name confusion, they came, with one exception, in the early 1950's. That was an era in which air service did not play nearly so large a part in meeting the transportation needs of nearly so many people as is true today. We think it reasonable to believe that the users of air service today are considerably more sophisticated than they were 20 years ago and that the risks of substantial confusion with respect to carrier identity and type of service are correspondingly small. We note in this connection that the only recent proceeding involving alleged name confusion resulted in a determination by the Administrative Law Judge that there had been no substantial confusion. Trans International Airlines v. Texas International Airlines, Docket 20857. There was no petition for discretionary review and the Board did not see fit to review on its own initiative. That case, we believe, tends to corroborate our view that increasing public sophistication has significantly reduced the risk of serious name confusion problems.

Based upon the foregoing, the Board finds that it would not be in the interest of the public to institute a proceeding under Section 411 in response to REA's complaints, and that the complaints do not set forth facts warranting investigation or other action.

ACCORDINGLY, IT IS ORDERED THAT the decision of the Director of the Bureau of Enforcement, dated June 8, 1973, is affirmed and the complaints are dismissed.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND
Secretary

(SEAL)

PETITION FOR RECONSIDERATION

BEFORE THE

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

REA EXPRESS, INC.	
v.	DOCKET 24810
DOMESTIC AIR EXPRESS, INC.	

REA EXPRESS, INC.	
v.	DOCKET 24811
WINGS AND WHEELS EXPRESS, INC.	

PETITION FOR RECONSIDERATION OF REA EXPRESS, INC.

On August 28, 1973, by Order 73-8-134, the Board affirmed the decision of the Director of the Bureau of Enforcement, dismissing the complaints of REA Express, Inc. (REA) in the above-mentioned proceedings. REA hereby files its Petition for Reconsideration.

In its opinion, the Board stated that REA failed "to make a threshold showing of reasonable grounds for believing that a

state of facts exists which warrants assumption of jurisdiction." (p. 4) The Board also found that the affidavit submitted by REA was "singularly lacking in specifics." (p. 4)

This is just game playing. REA has been forced to attempt to pin the tail on the donkey long enough. We have no idea, and can have no idea from the conclusory statements in this opinion, what specifics it takes to activate the CAB. The affidavit submitted was in fact full of specifics. It listed the names and addresses of specific customers who told REA employees that they thought specific shipments would go REA when they sent them on the services of respondents. It cited a survey of airline personnel which showed that 60% of them were confused over the relationship between REA and the respondents. It stated that the internal listings of the New Jersey Telephone Company do not differentiate between the services of REA and Air Express International, causing information operators to give the public erroneous information about the relationship between the two companies. It cited the testimony of a former employee of Domestic Air Express that Domestic Air Express received many calls for REA and secured the business for Domestic Air Express.

It appears from this that the Board chose to ignore the specifics in the affidavit and instead fall back on general conclusions.

The Board also makes much of the allegations that the respondents have used the name "Air Express" for many years, and that shippers are more sophisticated than they were formerly. This ignores the fact, stated by the Director of the Bureau of Enforcement in his letter declining to institute a proceeding, that "an argument of estoppel will not work against the Board's safeguarding of the public interest under section 411." (p. 3) Thus, the Board's obligation to prevent public confusion and to defend the public interest cannot be impaired even if the practice went back 400 years. Where the public believes that it is using REA's service and is instead using a service which may be more expensive, and which also returns less to the airlines on a ton-mile basis (Exhibit REA-324, Docket 22?08), the public interest in preventing such confusion is clear. As for the Board's assumption that "users of air service today are considerably more sophisticated than they were 20 years ago," there is no evidence for this in this proceeding. Compared with the specific allegations in the affidavit submitted by REA, as well as the detailed offer of proof, this assumption can have very little weight.

The Board also noted that if the fact that the words "air express" are common to the parties' corporate names were a violation of Section 411, "it would lead logically to the conclusion that the words 'air freight' render the names of

freight forwarders inherently confusing." (p. 3) This is completely invalid. All air freight forwarders have authority to carry air freight; therefore no complaint as to confusion could be made because they use air freight in their names. On the other hand, only REA has authority to carry "Air Express" and the use of "Air Express" by the respondents is likely to confuse the public into the belief that they carry Air Express.

Finally, the Board notes that the pending of Docket 22388 is an additional reason for dismissal of this complaint. Docket 22388 was argued before the Board in August, 1972, and has been pending for over a year. Neither REA nor the shipping public should be further adversely affected because of the Board's lack of action therein.

WHEREFORE, the Board should reconsider Order 73-8-134, and either (1) order REA's complaint docketed for hearing, so REA can submit proof of public confusion at that time, or (2) remand this proceeding to the Bureau of Enforcement to permit REA to submit detailed proof of public confusion.

Respectfully submitted,

Peter G. Wolfe

Peter G. Wolfe
Attorney

ANSWER OF WINGS AND WHEELS EXPRESS, INC.
TO PETITION FOR RECONSIDERATION

On October 6, 1972, REA Express, Inc. (REA) filed its complaint with the Board alleging that use of the name "Air Express International" by Wings and Wheels Express, Inc. (Wings and Wheels) was inherently likely to confuse Air Express customers of REA and make them believe that Wings and Wheels' services are really those of REA. On June 8, 1973, the Director of the Bureau of Enforcement issued his decision declining to institute an enforcement proceeding. On August 28, 1973, the Board affirmed the Director's decision and ordered REA's complaint dismissed (Order 73-8-134).

On June 6, 1972, in another proceeding, Wings and Wheels applied to the Board for permission to change its name to Air Express International Corporation and to operate its domestic as well as international air freight forwarding services under that name. The Bureau of Operating Rights having screened the application for possibility of public confusion as required by Part 215 of the Board's Economic Regulations, has noted no objections to the requested name change. In fact, operating under instructions from the Bureau, respondent has amended its articles of incorporation to change its name to Air Express International Corporation. However, completion of action on the name change application has been deferred pending resolution of this case.

Thus the possibility that use of the name Air Express International by respondent would cause public confusion has been before the Board for over a year. The Bureau of Operating Rights has found no cause for

public confusion; the Director of the Bureau of Enforcement has declined to institute an enforcement proceeding on the basis of the complaint and; the Board has ordered the complaint dismissed. Yet REA has now moved for reconsideration. This matter has been fully considered and repeatedly resolved in favor of Wings and Wheels. It would not be in the public interest to devote the Board's time and resources to further consideration of these allegations. It would only serve to unjustly delay respondent's efforts to consolidate its operations under a common name and provide improved service to the public. For the reasons more fully set out below REA's petition for reconsideration should be denied.

I.

In its order of August 28, 1973, the Board concluded that reason had not been shown to believe that there has been actual substantial public confusion sufficient to warrant institution of a formal proceeding under Section 411. Petitioner challenges this conclusion on the basis that it has offered specific examples of confusion. This assertion simply does not meet the requirements of Section 411. To justify the assumption of jurisdiction by the Board the complainant must present a basis for finding that substantial public confusion exists. That is, confusion which is frequent, common, persisting over a considerable period of time and is not sporadic, isolated or de minimis.

American Airlines v. North American Airlines, 351 U.S. 79 (1956); North American Airlines, Section 411 Proceeding, 18 C.A.B. 96 (1953); Air America, Inc., Section 411 Proceeding, 18 C.A.B. 810 (1954); Trans International Airlines, Inc. v. Texas International Airlines, Inc., Order 73-3-103, Dkt 20875, March 27, 1973. The allegations raised in the complaint present no issues that, if proven, would meet the requirements of this test. The interpretation set forth in the Petition for Reconsideration likewise fails to satisfy the standard. Thus the Board's order was predicated on the proper standard and petitioner has raised no issue requiring reconsideration.

It should be noted that most of the facts relied on by REA in its petition for reconsideration were not presented in its original complaint. Rather it amended its complaint nunc pro tunc and included additional material in its motion for review. The Board considered this material in making its decision on review. (Order, note 4 at page 2). Thus complainant has been afforded more than ample opportunity to make out a case. It has failed to do so and further consideration of its claims is not warranted.

II.

Petitioner's reliance on the distinction between "air express" and "air freight" in the historical and technical sense as a basis for institution of an enforcement proceeding is misplaced. As the Board has noted in its Order the continuance of that distinction is

currently under consideration in another proceeding. Express Service Investigation, Order 70-7-110 (July 23, 1970). Considering the long established use of the name Air Express International by respondent and the paucity of evidence of confusion offered by complainant it would be manifestly unfair to restrict use of the name on this basis. Nor can it be said that this tenuous distinction is a sufficient public interest basis for invoking Board jurisdiction.

Moreover, REA's own activities further weaken this distinction. On February 7, 1973, REA was authorized by the Board to conduct international air freight forwarding services. The authorization was issued to and REA provides air freight forwarding services through a wholly owned subsidiary named The Express Co., Inc. REA evidently does not consider that the use of the term "Express" in the name of its air freight forwarding subsidiary will cause public confusion as to the type of service offered. (See attached copy of Expressco advertisement from Automotive News of May 7, 1973).

CONCLUSION

For the foregoing reasons respondent requests the Board to deny the complaintant's petition for reconsideration.

Respectfully submitted
STROOCK & STROOCK & LAVAN
Attorneys for Respondent
Air Express International Corporation/
Wings & Wheels Express, Inc.

By: John M. Gibbons
John M. Gibbons

District of Columbia ss:

John M. Gibbons being first duly sworn deposes and says that he is the attorney for respondent, Air Express International Corporation, formerly Wings and Wheels Express, Inc.; that he has read the foregoing answer and that the matters stated are true of his own knowledge except such matters stated on information and belief which matters he believes to be true.

John M. Gibbons

Subscribed and sworn before me this

24th day of September, 1973

Phyllis B. Beaty

Notary Public

My Commission Expires December 15, 1973

CERTIFICATE OF SERVICE

I certify that service of the foregoing answer to complainant's motion for review was made on complainant REA Express, Inc., by mailing a copy, postage prepaid, to its attorney, Peter G. Wolfe, 219 East 42nd Street, New York, New York on September 24, 1973.

John M. Gibbons.

ANSWER OF DOMESTIC AIR EXPRESS, INC. TO
PETITION FOR RECONSIDERATION

REA EXPRESS, INC. v. DOMESTIC AIR EXPRESS, INC.	Docket 24810
REA EXPRESS, INC. v. WINGS AND WHEELS EXPRESS, INC.	Docket 24811

ANSWER OF DOMESTIC AIR EXPRESS, INC.

On September 14, 1973, REA Express, Inc. petitioned the Board for reconsideration of Order 73-8-134. REA has failed to allege any facts or circumstances not previously considered by the Board. Under these circumstances its petition should be denied.

WHEREFORE, Domestic Air Express, Inc. respectfully requests that the petition for reconsideration be denied.

Respectfully submitted,

/s/Alfred J. Eichenlaub
Alfred J. Eichenlaub

Attorney for
DOMESTIC AIR EXPRESS, INC.

September 21, 1973

CIVIL AERONAUTICS BOARD ORDER 73-12-102

A petition for reconsideration of the Board's decision in the above-entitled proceedings (Order 73-8-134, dated August 28, 1973) has been filed by REA Express, Inc. (REA). Answers opposing the petition have been filed by Domestic Air Express, Inc. and Wings and Wheels Express, Inc.

Upon consideration of the petition, the Board finds that it does not establish error in the Board's decision or present any matters that otherwise would warrant a grant of the relief sought.

ACCORDINGLY IT IS ORDERED THAT: The petition for reconsideration be and it hereby is denied.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND
Secretary

(SEAL)